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No. 00-730

In the Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,

PETITIONER,

v.

NORMAN Y. MINETA, SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION, *ET AL.*,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF SENATOR MAX BAUCUS, ET AL., *AMICI CURIAE* IN SUPPORT OF AFFIRMANCE OF THE TENTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether the Court of Appeals misapplied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination.

2. Whether the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling governmental interest.

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INTEREST OF AMICI CURIAE

This brief is submitted on behalf of certain individual members of the United States House and Senate (the "Congressional Amici") as amici curiae.[1] The Congressional Amici have a strong interest in affirming the constitutionality of the statutory scheme underlying the United States Department of Transportation's current affirmative action programs for construction projects. We believe that this statutory scheme is a constitutionally permissible authorization to the Department of Transportation ("DOT") to take steps to remedy egregious and documented discrimination against small disadvantaged business enterprises ("DBEs") in federal and federally-assisted contracting.

We have a more general interest in ensuring that the federal government has the authority and flexibility necessary to continue to make meaningful progress in our Nation's quest for racial equality, both in DOT and other programs implemented by the Executive Branch. We are aware that DOT has engaged in extensive efforts to devise regulations that comply with this Court's guidance regarding the constitutional requirements for race- and gender-conscious remedies for discrimination. While the focus of the brief is the statutory framework and, therefore, does not take a position on the regulations at issue in this case, some of the amici have reviewed these regulations, including the extensive reforms which DOT has implemented since 1998, and have concluded that these regulations meet constitutional requirements. If this Court discerns a constitutional defect in one or more of DOT's

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[1] A list of these individual members of Congress is included in the appendix to this brief. Counsel for the Congressional Amici were the sole authors of this brief. No person or entity other than the Congressional Amici made a financial contribution to this brief. Pursuant to Supreme Court Rule 37.2(3)(a), all parties have consented to the filing of this brief. These consents have been filed concurrently with this brief.

implementing regulations, we respectfully urge the Court to make clear that the underlying statutory framework remains constitutionally sound.

SUMMARY OF THE ARGUMENT

When this Court first considered this case, it held that "strict scrutiny" applies to all racial classifications employed by any governmental entity. It also stated that strict scrutiny is not necessarily "fatal in fact" and that race-conscious remedial programs are constitutional if they are narrowly tailored to further the compelling interest of remedying the effects of identified racial discrimination. The statutory scheme at issue in this case meets these requirements.

As this Court has explained, the proper application of strict scrutiny respects the important institutional differences between the United States Congress and other governmental institutions such as state agencies and local city councils. Race-conscious measures undertaken by the federal government must be narrowly tailored to achieve a compelling interest; but, as the national legislature, Congress is entitled to identify that interest and tailor its statutory response at a level of generality appropriate to nationwide legislation. Thus, when deciding whether the problems it confronts are national in scope, Congress may consider nationwide rather than local evidence. Congress may also authorize nationwide programs and, within appropriate constitutional limits, entrust the narrow tailoring of these programs to the Executive Branch. For example, Congress may enact a statute authorizing a race- or gender-conscious remedy in all areas of the country even if evidence shows that, at a particular time, the effects of discrimination are present only in certain areas of the country. The Executive Branch agencies may then tailor the program to address areas of the country where those effects are present. Congress may also determine that

certain groups have presumptively been affected by discrimination based on their race or gender and authorize Executive Branch agencies to employ the presumption only under appropriate circumstances. In reviewing these statutes, the role of the courts is to determine whether these statutory authorizations can be applied in a constitutional manner. If so, the statutes are constitutional.

Under an appropriate application of strict scrutiny as applied to national legislation, the statutes underlying DOT's affirmative action programs are constitutional. Congress had far more than the "strong basis in evidence" required by this Court when it concluded, repeatedly over the past two decades, that minority-owned contracting firms have faced substantial discriminatory barriers to fair and equal participation in federal contracting simply because of their race. Furthermore, Congress has more recently gathered strong evidence showing that women-owned firms are adversely affected by discrimination in their efforts to become competitively viable. Many of the same factors that hamper the growth of minority-owned firms harm women-owned firms as well.

The statutes authorizing DOT's affirmative action programs provide sufficient discretion to DOT to implement remedies that are narrowly tailored to address this history of discrimination in a manner that is sensitive to the differences between the various regions of this country. These statutes set modest aspirational goals for participation by small minority- and women-owned firms. Moreover, they permit implementing officials to modify—or disregard—those goals if local or individual circumstances show that they are not needed or that achieving them would involve inappropriate costs. The statutes also provide a presumption regarding groups that have been adversely affected based on race or gender. They permit Executive Branch officials to apply this presumption in a flexible way

and to disregard it under appropriate circumstances. Moreover, the statutes do not require any implementing Executive Branch agency or recipient of federal funds to employ a quota or set-aside.

Because these statutes are narrowly tailored to further Congress' compelling interest in—indeed, responsibility for—remedying the persistent and egregious discrimination against minority-owned firms in federal contracting, the Congressional Amici respectfully urge this Court to affirm the judgment of the Tenth Circuit Court of Appeals.

ARGUMENT

I. CONGRESS HAS A COMPELLING INTEREST IN REMEDYING DISCRIMINATION IN GOVERNMENT CONTRACTING

When this Court first had the opportunity to consider this case, it made clear that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) ("*Adarand I*"). The current statutory regime satisfies this test.

Remedying and eradicating the effects of past and present racial discrimination is indisputably an appropriate and compelling justification for legislative action. As this Court explained in *Adarand I*, "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." 515 U.S. at 237. That interest includes a compelling responsibility to ensure that public funds appropriated and spent by Congress are not used to finance and entrench a system of private discrimination. *See*

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989) (O'Connor, J.) ("It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.").

A. Because Congress Legislates At A National Level, The Evidence It Considers Is National In Scope

As the national legislature, Congress has a unique role in our constitutional structure. It has greater responsibilities than State and local governments and different institutional strengths in carrying them out. Because of its unique authority to identify nationwide problems and craft nationwide solutions, Congress necessarily reviews evidence and legislates at a higher level of generality than a State or locality. Although this Court has held that race-conscious remedial action undertaken by Congress is subject to the same "strict scrutiny" as similar programs undertaken by State and local governments, *see Adarand I*, 515 U.S. at 235, the Court has never suggested such scrutiny requires a reviewing court to ignore the important institutional and jurisdictional differences between Congress and other government institutions. Petitioner's suggestion that Congress is required to compile local disparity studies for every community nationwide before authorizing a national program, *see* Pet.'s Br. at 33-34, has no basis in this Court's precedents and shows a profound lack of understanding of Congress' constitutional role.

It is neither appropriate nor practicable to require Congress, in enacting national legislation, to investigate and make detailed findings regarding the justification and expected consequences of this legislation in every community that may be affected. If such narrow local findings were required before Congress could employ a

race- or gender-conscious remedy to redress identified, nationwide discrimination, Congress could not, as a practical matter, act at all. Consequently, only States and localities could employ such remedies—a result which is directly contrary to the letter and spirit of the Fourteenth Amendment. *Cf. Croson*, 488 U.S. at 521-22 (Scalia, J., concurring) ("[I]t is one thing to permit racially based conduct by the Federal Government—whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment—and quite another to permit it by the precise entities against whose conduct in matters of race that Amendment was specifically directed.") (citing U.S. Const. amends. 14, § 5 and 14, § 1, respectively).

As this Court has repeatedly recognized, even the most searching judicial scrutiny should be applied in a manner that takes account of Congress' uniquely national responsibilities and authority. In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), a plurality carefully reviewed the legislative history of the initial version of the current program and concluded that "Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination," and that "Congress acted within its competence to determine that the problem was national in scope." 448 U.S. at 477-78 (Burger, C.J.). The evidence relied upon by Congress in making that determination included nationwide statistics gathered by federal agencies about past experience with federal contracting, locality-specific evidence of discrimination in "state and local construction contracting," *id.* at 478, and testimony and anecdotal evidence presented to congressional committees. *See id.* at 457-68, 477-78 (Burger, C.J.); *see also id.* at 503-06 (Powell, J., concurring) (finding, upon a review of the legislative record, that "Congress reasonably concluded that private and governmental

discrimination had contributed to the negligible percentage of public contracts awarded [to] minority contractors").

In *Croson*, this Court again acknowledged that the national scope of Congress' responsibilities distinguished its authority from that of State and local governments, whose laws cannot reach beyond their limited geographical jurisdictions. 488 U.S. at 489-91. As Justice O'Connor explained, "Congress may identify and redress the effects of society-wide discrimination," *Id.* at 490, and the evidence relevant to its use of race-conscious measure is therefore inherently and inescapably different. "[O]ther governmental entities might have to show more than Congress before undertaking race-conscious measures: 'The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of the governmental body.'" *See id.* at 489 (O'Connor, J.) (quoting *Fullilove*, 448 U.S. at 515-16 n.14 (Powell, J., concurring)); *cf. Oregon v. Mitchell*, 400 U.S. 112, 117-18 (1970) (Black, J.) (unanimously upholding Congress' authority to apply provisions of the Voting Rights Act nationwide without making state-by-state findings).

The fact that Congress appropriately considers nationwide evidence when identifying nationwide problems, however, does not mean that a reviewing court must ignore local differences when considering the specific application of a congressional policy. *See, e.g., Croson*, 488 U.S. at 504 ("By its inclusion of a waiver procedure in the national program addressed in *Fullilove*, Congress explicitly recognized that the scope of the problem would vary from market area to market area."); *Fullilove*, 448 U.S. at 514 (Powell, J., concurring) ("Although the set-aside is pegged at a reasonable figure, its effect might be unfair if it were applied rigidly in areas of the country where minority group members constitute a small percentage of the population.

To meet this concern, Congress enacted a waiver provision....").

B. Strict Scrutiny Does Not Require This Court To Abandon Its Traditional Respect For Congress' Factual Findings

The evidence supporting Congress' findings of persistent and egregious discrimination in this case is so overwhelming, *see* Section II *infra*, that this Court need not decide the precise extent of deference owed to Congress' factual findings, either generally or in the specific context of Congressional remedies for racial discrimination. It is clear that the required "strong basis in evidence" for Congress' findings exists in this case even if this Court gives Congress the same deference it gives to fact-finding by State and local legislative bodies.

If it should reach the issue, however, this Court should recognize at a minimum that the proper application of strict scrutiny does not require it to abandon its traditional respect for Congress' unique constitutional position as a coequal branch of government, or its sensible recognition that the fact-gathering resources of Congress and the information that it properly considers when considering legislation far exceed those available to any reviewing court. *See, e.g., Fullilove*, 448 U.S. at 502-03 (Powell, J., concurring) (Congress' "special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue."). Furthermore, given Congress' constitutional obligation to address and redress racial discrimination in this country, the degree of judicial deference paid to its factual findings in this area has traditionally been greater than that afforded to the States. *See, e.g., Croson*, 488 U.S. at 487-92. That respect is particularly appropriate where, as here, the subject matter involves our Nation's continuing struggle with the effects of past and present racial

discrimination. Congress, "unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment." *Id.* at 490. This Court has consistently recognized that "[t]he power to 'enforce' may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." *Id.* (citing *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)).

When considering whether Congress has compiled a sufficient record to support the abrogation of a State's sovereign immunity under the Eleventh Amendment, this Court has cited as an example of substantial congressional fact-finding the evidentiary record which Congress amassed over the past thirty years demonstrating a pattern of egregious racial discrimination in regard to voting in this country. *See, e.g., Board of Trustees of the Univ. of Alabama v. Garrett*, 121 S. Ct. 955, 967-68 (2001) (noting the "'great care'" with which Congress "documented a marked pattern of unconstitutional action by the States" in discriminating against minority voters) (relying on *South Carolina v. Katzenbach*, 383 U.S 301, 308, 312 (1966)); *see also City of Boerne v. Flores*, 521 U.S. 507, 530-33 (1997) (also citing *Katzenbach*). Here, Congress has likewise built a substantial record concerning the prevalence and persistence of racial discrimination within the construction industry prior to enacting the legislation which is at issue in this case. All of this evidence has been thoroughly considered and analyzed through countless hearings, studies, and debates. *See, e.g.*, 61 Fed. Reg. 26042, 26051-52 & n.12 (May 23, 1996); H.R. Rep. No. 100-736, at 7-57 (1988); 144 Cong. Rec. S1401-04, S1408-10, S1419-21, S1424-28 (Mar. 5, 1998) (statements of Sens. Warner, Baucus, Kerry, Wellstone, Mosely-Braun, and Domenici).

Petitioner argues that Congress is entitled to a lesser degree of judicial deference because it is not acting on the basis of its power under Section 5 of the Fourteenth Amendment. *See* Pet.'s Br. at 22-23 & n.15. Whether or not Section 5 applies to the various Congressional actions at issue here depends in part on how this Court ultimately decides to frame the scope of Petitioner's challenge.[2] Whether or not Section 5 technically provided Congress the authority for the particular statutes under review in this case, the core factual findings of discrimination in the contracting industry at issue here have been repeatedly made by Congress in contexts where it was unquestionably exercising its unique authority under that Section. *See, e.g.*, *Croson*, 488 U.S. at 504 (recognizing that, in enacting the MBE program upheld in *Fullilove*, "Congress was exercising its powers under § 5 of the Fourteenth Amendment in making a finding that past discrimination would cause federal funds to be distributed in a manner which reinforced prior patterns of discrimination"). Congress is not required to forget the facts it has gathered and the conclusions it has drawn when it moves on to a new statute. *Fullilove*, 448 U.S. at 502-03.

C. Strict Scrutiny Does Not Limit Congress To Considering Only A Narrow, Particular Class Of Evidence

Petitioner also argues that Congress is not entitled to consider any evidence other than statistical studies meeting four arbitrary "criteria" when determining whether a compelling interest in remedying racial discrimination exists. *See* Pet.'s Br. at 28-33. Petitioner further contends

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[2] In particular, Petitioner appears to argue that only Federal Executive Branch contracting is at issue, not DOT's program providing grants to States and localities. *See* Pet.'s Br. at 15-17 & n.10. The Congressional Amici do not take a position on the various standing, law of the case, and waiver issues associated with this argument.

that Congress cannot conclude that a problem is nationwide in nature, and therefore amenable to a nationwide remedy, unless it identifies strong evidence of that problem "in at least a majority of States." *Id.* at 33-34. Neither of these arbitrary limits on Congressional authority has any foundation in this Court's precedents, and both are incompatible with the legislative process and Congress' unique position in our constitutional system.

This Court has never suggested that Congress may consider only statistical evidence—and then only statistical evidence satisfying certain arbitrary study-design criteria laid down by the federal courts—when studying critical national issues like the ongoing presence and effects of racism in our society. To the contrary, the Court has appropriately recognized that "[t]he factfinding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary," *Croson*, 488 U.S. at 500, and that Congress is far better positioned than the courts to "'amass and evaluate the vast amounts of data'" relevant to national policy. *See Turner Broad. Sys. v. FCC*, 520 U.S. 180, 195 (1997) (citation omitted).

As this Court explained in *Turner*, "[t]he Constitution gives to Congress the role of weighing conflicting evidence in the legislative process." 520 U.S. at 199. As a result, the federal courts "must give considerable deference, in examining the evidence, to Congress' findings and conclusions." *Id.* Congress is certainly entitled to rely on a fact-finding process that is as broad and flexible as that relied on by state legislatures, which can involve many different types of evidence, including anecdotal evidence. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 393-94 (2000) (finding that the evidence supporting Missouri's campaign finance reform law, which consisted mainly of a series of "newspaper accounts of large contributions support[ed] inferences of impropriety," did "not present a

close call" as to the sufficiency of the legislative record supporting reform); *cf. Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 627-28 (1995) (noting that "[t]he anecdotal record" supporting the regulation on attorney solicitations "[wa]s noteworthy for its breadth and detail," especially since the views expressed by these individuals corresponded with the general conclusions of the statistical studies that were performed). While Congress must support its legislation with something more than "a generalized assertion as to the classification's relevance to its goals," *see Croson*, 488 U.S. at 500-01, or "mere conjecture," *see Nixon*, 528 U.S. at 392, this Court has repeatedly explained that a "'strong basis in evidence' need not take any particular form." *See, e.g., Bush v. Vera*, 517 U.S. 952, 994 (1996) (O'Connor, J., concurring); *accord Abrams v. Johnson*, 521 U.S. 74, 110 (1997) (Breyer, J., dissenting).

Indeed, Petitioner's proposed test would leave Congress with much less latitude for the application of its sound common sense than the jury is permitted in any routine Title VII case. That cannot be, and is not, the law. As Justice Kennedy explained in *Croson*, "evidence which would support a judicial finding of intentional discrimination may suffice also to justify remedial legislative action, for it diminishes the constitutional responsibilities of the political branches to say they must wait to act until ordered to do so by a court." 488 U.S. at 519 (Kennedy, J., concurring); *see also Fullilove*, 448 U.S. at 457-68, 477-78 (Burger, C.J.) (summarizing and approving of evidence relied on by Congress, including direct testimony and anecdotal evidence); *see also id.* at 503-06 (Powell, J., concurring).

Petitioner's suggestion that Congress cannot assert a compelling interest in remedying a problem on a national scale unless it makes specific findings that that problem occurs in at least a majority of the States is similarly arbitrary and unsupportable. As previously explained, *see*

Section I.A *supra*, this Court has never required Congress to make state-by-state findings when it legislates nationally. *See also Fullilove*, 448 U.S. at 457-468, 477-78 (Burger, C.J.); *id.* at 504-06 (Powell, J., concurring); *accord Croson*, 488 U.S. at 488-492. Any rigid requirement that Congress make detailed state-by-state or city-by-city findings is simply incompatible with the legislative process. *See Fullilove*, 448 U.S. at 478 (Burger, C.J.) ("Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings.").

D. Congress Had A Strong Basis in Evidence For Concluding That Construction Contracts Were Affected by Race And Gender Discrimination

Strict scrutiny requires only that there be a "'strong basis in evidence for [Congress'] conclusion that remedial action was necessary,'" *Croson*, 488 U.S. at 500 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986)), in order to "smoke out" the possibility that an assertedly remedial statute was "'in fact motivated by illegitimate notions of racial inferiority or simple racial politics.'" *Adarand I*, 515 U.S. at 226 (quoting *Croson*, 488 U.S. at 493). Given the evidence of discrimination accumulated by Congress over the last twenty-five years—evidence described by the District Court as "vast," *Adarand Constructors, Inc. v. Pena*, 965 F. Supp. 1556, 1576 (D. Colo. 1997) ("*Adarand II*"), and by the *Fullilove* Court as "abundant," 448 U.S. at 477-78 (Burger, C.J.)—it is now beyond the boundary of reasonable dispute that the requisite "strong basis in evidence" exists for Congress to authorize the flexible programs at issue here.

1. Congress Has Gathered Compelling Evidence Of Discrimination

Over the last thirty years, Congress has carefully studied the effects of discrimination against small businesses owned by minorities and women who are

attempting to participate in federal, state and local contracting. Based on this review, Congress has concluded that the problem of race and gender discrimination remains serious enough that it may be necessary, in appropriate circumstances, for implementing agencies to employ a narrowly tailored race-conscious remedy. Congress has also recognized that local or individual circumstances may not always justify such a remedy and has given the implementing officials the flexibility they need to suspend or modify their programs as appropriate. That evidence is far too voluminous to fully recount, or even summarize, here—just as it could not be fully catalogued in the Tenth Circuit's opinion or in the Appendix to the Department of Justice's 1996 report on Proposed Reforms to Affirmative Action in Federal Procurement, alternatively cited in this litigation as "Appendix A" or "The Compelling Interest." *See* 61 Fed. Reg. 26042, 26050-63 (May 23, 1996). We therefore limit our discussion to the following key points.

First, it is critical to recognize that this evidence must be viewed cumulatively as a whole rather than in isolation. Congress' consideration of the disputed statutory provisions and prior laws, for example, was not informed solely by the voluminous materials explicitly referenced in the legislative history of those laws, but also by Congress' experience with similar legislation over more than twenty years, beginning with the enactment of Section 103(f)(2) of the Public Works Employment Act of 1977 ("PWEA"), Pub. L. 95-28, 91 Stat. 116, 117.

Second, the breadth of the evidence considered in that cumulative legislative record is important not merely because of its sheer aggregate weight and persuasiveness, but also because the very diversity of that evidence should allay the concerns that this Court expressed in *Croson* about the permissibility of inferring discrimination from evidence of mere disparity. 488 U.S. at 502-06. Modern

social science has distinct limitations, and no statistical study ever manages to eliminate all variables but the one being studied. It is always possible, therefore, to point to a flaw or an alternative explanation for the results of an individual study or other piece of evidence that seems to indicate discrimination. But when many thousands of individual pieces of evidence, gathered over the course of decades from many different locations using widely diverse methods, suggest the same inference, Congress must be entitled to draw that reasonable inference. As this Court has already recognized in this very case, "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality." *Adarand I*, 515 U.S. at 237. With all due respect, it would be a drastic reversal of institutional roles for this Court to substitute its judgment for Congress' on this basic and crucially important factual question.

Third, this Court has already held in *Fullilove* that the evidence relied upon by Congress in enacting Section 103(f)(2) of the PWEA in 1977 was sufficient to establish a compelling interest in race-conscious relief. Chief Justice Burger's plurality opinion had no difficulty concluding that the legislative record before Congress contained "abundant evidence" supporting the conclusion that "minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination." 448 U.S. at 477-78 (Burger, C.J.). The relevant legislative record in this case contains the same evidence that this Court considered in *Fullilove*, as well as the accumulated products of an additional twenty years of careful study by Congress and various federal agencies.

2. Petitioner's Brief Misstates The Nature And Scope Of The Evidence Considered By Congress

Petitioner claims that the "strong basis in evidence" identified by Congress and the Tenth Circuit consisted solely of evidence indicating that minority-owned businesses face various race-neutral barriers common to all small entrants in the contracting business, such as "[t]he difficulty of obtaining access to capital in the absence of a credit history or collateral." *See* Pet.'s Br. at 27. In fact, the legislative record is replete with evidence, discussed in part by the Tenth Circuit, that minority and women-owned businesses face obstacles that differ in both kind and degree from those faced by white-owned contracting firms of similar size, experience, and capitalization.

As this Court has recognized, Congress first adopted the race-conscious measures considered in *Fullilove* only after several decades of experience with the race-neutral provisions of the Small Business Act and other federal programs showed that those race-neutral alternatives were wholly ineffective. *See, e.g., Croson*, 488 U.S. at 507 ("The principal opinion in *Fullilove* found that Congress had carefully examined and rejected race-neutral alternatives before enacting the MBE set-aside."); *see also Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1178 (10th Cir. 2000) ("*Adarand III*") (noting the district court's unchallenged finding in this case, now law of the case, that "Congress over a period of decades attempted to correct by race-neutral means the problem of too few minority subcontractors for government construction contracts, and only after it continued to find discriminatory effects did it first implement a race-conscious remedy").

More recently, Congress was presented with dramatic evidence of the consequences for minority-owned contracting firms when existing DBE programs are

eliminated. As numerous Senators and Representatives pointed out in the floor debates over the reauthorization of the DBE program in the Transportation Equity Act for the 21st Century, Pub. L. 105-178, 112 Stat. 107 ("TEA-21"), the evidence shows that when a State eliminates or abandons its affirmative action programs, participation by women and minorities in State contracting drops precipitously, often falling to or near zero. *See* 144 Cong. Rec. S1401, S1404, S1409, S1420, S1426 (Mar. 5, 1998) (statements of Sens. Warner, Baucus, Kerry, Mosely-Braun, and Domenici) (discussing the experience in, *inter alia*, Arkansas, Louisiana, Missouri, Michigan, Arizona, Delaware, Nebraska, Oregon, and Rhode Island). By contrast, given the existence of DOT's affirmative action program, minority- and women-owned businesses typically received between 10 and 15 percent of the subcontracts on federal projects in these States. *See id.* Although these firms were qualified and able to perform work on federal construction projects, they were "completely shut out" of state contracting opportunities. *Id.* at S1409 (statement of Sen. Kerry). Given this and the other evidence available to it, Congress could reasonably and permissibly conclude that these businesses were continuing to experience discrimination by others in the transportation-related construction industry.

While Petitioner may argue that these firms simply lost contracts because they did not submit the lowest bid, the legislative record compiled by Congress demonstrates that this failure is all too often the result of race and gender discrimination. In particular, Congress had extensive direct evidence of unmistakable and invidious discrimination against minorities, women, and the firms they owned by: (1) employers who discriminate against individuals on the basis of their race and gender; (2) prime contractors who engage in "bid shopping," so that white firms receive an additional chance to undercut the bid of a minority firm; (3) unions

which have sometimes kept minorities out of their organizations; (4) suppliers who often engage in discriminatory pricing by charging minority-owned firms prices which are far in excess of those paid by white businesses; and (5) lending and bonding institutions which typically refuse to provide the necessary financing to minority- and women-owned businesses or simply do so in far lower quantities at far higher rates. *See, e.g.*, 61 Fed. Reg. at 26054-62, H.R. Rep. No. 100-736, at 7-57.

As the Tenth Circuit put it, these patterns of discrimination "ha[ve] woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide." *See Adarand III*, 228 F.3d at 1168. For example, "[o]ver and over again, studies show that minority applicants for business loans are more likely to be rejected and, when accepted, receive smaller loan amounts than nonminority applicants with *identical* collateral and borrowing credentials." 61 Fed. Reg. at 26057-58. Congress also possessed evidence that materials suppliers deliberately charge higher prices for the same goods to minority-owned firms. *See id.* at 26061. Obviously, these and the other factors noted by Congress demonstrate that racial discrimination continues to skew the distribution of governmental contract and subcontract awards at both the state and federal level.

Congress carefully considered all of this evidence when re-authorizing the DBE program in TEA-21 in 1998. *See, e.g.*, 144 Cong. Rec. S1422, S1430 (Mar. 5, 1998) (statements of Sens. Robb and Kennedy); *id.* at S5414 (May 22, 1998) (statement of Sen. Chafee); *see also* 144 Cong. Rec. H2006, H2010, H2011 (Apr. 1, 1998) (statements of Reps. Scott, Dixon, and Millender-McDonald). Those comments and others show beyond any doubt that the extensive evidence of overt discrimination in the construction industry presented to the courts below was in fact carefully

considered by Congress. Indeed, Representative Norton's discussion of that evidence during the House debate is particularly noteworthy. *Id.* at H3957-60 (May 22, 1998).

While Petitioner suggests that a recent "benchmark" study conducted by the Department of Commerce ("DOC") and an assessment of DOT's DBE program prepared by the General Accounting Office ("GAO") undermine Congress' "compelling interest" findings, this argument is meritless. First, even if the conclusions of these two studies were inconsistent with other evidence, they would not outweigh the overwhelming evidence that points in the other direction. Second, and more importantly, the conclusions of these studies are not inconsistent with Congress' findings.

The federal government uses the process of "benchmarking" to determine when race-conscious measures are needed in a particular region in order to address a disparity in federal contract awards in situations where it has been "demonstrat[ed] that minority business formation and operation in a specific industry has been suppressed by discrimination." *See* 61 Fed. Reg. at 26045-46. Benchmarking employs an economic and statistical analysis which is designed to measure gaps in contracting awards to small minority-owned prime contractors compared to their white counterparts, taking into account the size, age and other relevant characteristics of these businesses. *See* 63 Fed. Reg. 35714, 35716-18 (June 30, 1998). As a result, the federal government is better able to measure the lack of minority participation in government contracts which results from discrimination.

Moreover, the benchmarking study is limited to prime contractors, and it does not purport to measure the obstacles faced by new firms attempting to enter the market either as a prime contractor or a subcontractor. Nor does benchmarking attempt to measure the level of contracting that groups would achieve in the absence of affirmative

action programs. Consequently, it understates the disparities that would exist in the absence of such programs. *See* 63 Fed. Reg. at 35718 & n.10. The benchmarking study is also based on regional assessments and does not indicate how many States within each region show continuing effects of discrimination. Therefore, a finding that there are not identifiable effects of discrimination within a given region overall does not mean there are not such effects in certain States within that region.[3]

Presently, the DOC has concluded that no significant disparity exists in the awarding of federal construction contracts to prime contractors in seven out of nine regions in this country. *See* 64 Fed. Reg. 52806, 52808 (Sept. 30, 1999). As a result, the federal government has suspended its race-based affirmative action efforts in these areas. *See* 61 Fed. Reg. at 26046-47. The primary conclusion to be drawn from the benchmarking study is that the Executive Branch has developed a method to narrowly tailor the remedial scheme authorized by Congress by ensuring that race-based measures are used only where and when they are necessary.

The GAO report cited by Petitioner attempted to measure the progress of DOT's current DBE program. *See* GAO, Report to Congressional Committees: Disadvantaged Business Enterprises, Critical Information Is Needed To Understand Program Impact 3-4 (June 2001). This report primarily concluded that inconsistent data-gathering and record-keeping by State agencies made it impossible to

[3] Because the DOC's benchmarking study is based on regional assessments, it does not indicate how many States within each region show continuing effects of discrimination. Obviously, a finding that there are no effects of discrimination in federal contracting in a particular region does not mean there are no such effects in certain states within the region. In this respect, the study provides no support for Petitioner's claim that "Congress ha[s] affirmative reason to believe there is no nationwide discrimination against minority highway construction companies." *See* Pet.'s Br. at 33-34.

definitively answer questions concerning the program's success. *Id.* at 18-24. The report certainly did not conclude that DBEs do not face discrimination in the contracting industry. To the contrary, GAO noted that, where "sufficient data" was available about the effects of discontinuing a DBE program (in Minnesota and Louisiana), the results showed that DBE participation in contracting "dramatically declined" when an affirmative action program was cancelled, *id.* at 38-40, which only serves to reinforce the earlier findings made by Congress on this point. *See* Section I.B *supra*. In fact, the report's most skeptical assertion is that "limited data" and "methodological weaknesses" which are "inherent in conducting disparity studies" and "common to social science research" created "uncertainties" about the findings of discrimination in fourteen recent disparity studies. *See* GAO Rept. at 29. That is hardly a repudiation of Congress' extensive findings.

II. THE STATUTES AT ISSUE IN THIS CASE ARE NARROWLY TAILORED TO FURTHER THE COMPELLING INTEREST IDENTIFIED BY CONGRESS

A. Congress Can Leave Details Of Implementation To Executive Branch Agencies

Any race-conscious measures must be narrowly tailored to further Congress' compelling interest in remedying, and avoiding passive participation in, identified discrimination. *See Adarand I*, 515 U.S. at 237. When Congress authorizes the Executive Branch to implement a national program that includes race-conscious and gender-conscious remedies, "narrow tailoring" at the statutory level requires only that the statute's requirements not be facially unconstitutional, and that they permit agencies the flexibility needed to employ these remedies under appropriate circumstances.

As this Court recognized in both *Fullilove* and *Croson*, if Congress provides the implementing agencies sufficient

flexibility to narrowly tailor a race-conscious remedy, it need not specify on the face of the statute precisely how such a remedy would be employed under all circumstances. Chief Justice Burger emphasized this point in *Fullilove*, noting that "[a]dministrative definition has tightened some less definite aspects of the statutory identification of the minority groups encompassed by the program...to... eliminate from participation in the program [D]BE's who are not 'bona fide' within the regulations and guidelines," and that the program permitted administrative waivers if its percentage goals could not be achieved in a particular instance "within the limitations of the program's remedial objectives." 448 U.S. at 487-88 (Burger, CJ.); *see also id.* at 468 ("Congress relied on the administrative agency to flesh out this skeleton, pursuant to delegated rulemaking authority, and to develop an administrative operation consistent with legislative intentions and objectives.").

B. The Statutory Goals Are Narrowly Tailored

The aspirational goals for minority participation in federal contracting included in the Small Business Act and TEA-21 are narrowly tailored to achieve the compelling interest identified by Congress. They were enacted at a level of generality appropriate to national legislation, and they permit Executive Branch officials charged with implementing those goals adequate flexibility to narrowly tailor the program's implementation to local or even individual conditions. Although there are minor variations in language, the statutory goals for DBE participation in federal contracting share one important characteristic: all of them are aspirational and expressly subject to administrative waiver or revision, on both a national and local level, in the event that implementing agencies and officials determine that they exceed the program's remedial justification.

The statutes all provide that the relevant targets are "goals" and that they apply "[e]xcept to the extent the Secretary determines otherwise." *See, e.g.*, TEA-21, Pub. L. No. 105-178, § 1101(b)(1), 112 Stat. 107, 113 (1998); Intermodal Surface Transportation Efficiency Act of 1991, Pub L. No. 102-240, Tit. I, § 1003(b), 105 Stat. 1914, 1919-1920 ("ISTEA") (same). Because of this flexibility, these goals have nothing in common with the "rigid [30%] racial quota" invalidated by this Court in *Croson*. 488 U.S. at 499; *id.* at 504 ("By its inclusion of a waiver procedure in the national program addressed in *Fullilove*, Congress explicitly recognized that the scope of the problem would vary from market area to market area."); *Fullilove*, 448 U.S. at 514 (Powell, J., concurring) ("Although the set-aside is pegged at a reasonable figure, its effect might be unfair if it were applied rigidly in areas of the country where minority group members constitute a small percentage of the population. To meet this concern, Congress enacted a waiver provision....").

The new DOT regulations implementing its DBE program demonstrate full well that the challenged statutes leave sufficient flexibility for constitutional application. Those regulations expressly recognize that the 10 percent statutory goal in TEA-21 is "an aspirational goal at the national level" which "does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level." 49 C.F.R. § 26.41 (2000). Instead, recipients must set goals for DBE contract participation on the basis of "demonstrable evidence of the availability of ready, willing and able" DBEs in the recipient's local market. 49 C.F.R. § 26.45 (2000). That goal must be based on all available evidence concerning that market, and its justification must be carefully documented in a plan submitted to DOT. *Id.* Thus, a state must effectively undertake its own benchmarking analysis in order to determine whether race-conscious measures are

necessary and, if so, to what degree. Therefore, like the federal government's benchmarking approach, the use of these race-conscious remedies can be narrowly tailored to fit the precise needs of the jurisdiction in question.

Moreover, once a goal is set, the recipient must then use race-neutral means to "meet the maximum feasible portion" of that goal. 49 C.F.R. § 26.51(b) (2000) (detailing the various race-neutral means available). The regulations explicitly prohibit the use of quotas, and permit set-asides only in "limited and extreme circumstances...when no other method could reasonably be expected to redress egregious instances of discrimination." 49 C.F.R. § 26.43 (2000). The recipient also need not actually meet its goals, but must merely make a good faith effort to do so. 49 C.F.R. § 26.47 (2000). Waivers and exemptions are also available under appropriate circumstances. 49 C.F.R. § 26.15 (2000).

Congress was well aware of DOT's efforts to narrowly tailor these programs, and considered that capacity to be an essential feature of the statutory scheme when it reauthorized the DBE program in TEA-21. *See, e.g.*, 144 Cong. Rec. S1401, S1402, S1408, S1423, S1425, S1428, S1430, S1433 (Mar. 5, 1998) (statements of Sens. Warner, Baucus, Kerry, Domenici, Kennedy, and Boxer); *see also* 144 Cong. Rec. H2001, H2003, H2004, H2008-11 (Apr. 1, 1998) (statements of Reps. Tauscher, Poshard, Bonoir, Meek, Towns, and Millender-McDonald).

C. The Race and Gender-Conscious Presumptions Are Narrowly Tailored

The race- and gender-conscious presumptions of disadvantage included in these statutes are also narrowly tailored to advance Congress' compelling interest in ensuring that federal funds do not serve to finance and perpetuate the evils of race and gender discrimination in the transportation-related contracting industry.

1. Congress Reasonably Concluded That A Presumption Is Necessary

The inclusion of race- or gender-conscious presumptions at the statutory level represents Congress' reasonable conclusion that these programs may, in some circumstances, need to be race- and gender-conscious in order to be effective. Congress decided to authorize flexible race- and gender-conscious remedies only after purely race- and gender-neutral measures had proven wholly ineffectual at remedying the identified discriminatory conditions in the contracting industry. As Justice Powell acknowledged in *Fullilove*, at the time Congress enacted the initial version of this legislation, "it knew that other remedies had failed to ameliorate the effects of racial discrimination in the construction industry. Although the problem had been addressed by anti[-]discrimination legislation, executive action to remedy employment discrimination in the construction industry, and federal aid to minority businesses, the fact remained that minority contractors were receiving less than 1% of federal contracts." 448 U.S. at 510 (Powell, J., concurring).

A majority of this Court in *Croson* cited that factual finding from *Fullilove* with approval. 488 U.S. at 504. The District Court in this case made a similar factual finding. "Congress over a period of decades attempted to correct by race-neutral means the problem of too few minority subcontractors for government construction contracts, and only after it continued to find discriminatory effects did it first implement a race-conscious remedy." *See Adarand III*, 228 F.3d at 1178.

Contrary to Petitioner's assertion, this Court did not hold in *Croson* that a race-conscious remedy can only be narrowly tailored if its beneficiaries are expressly limited to identified, individual victims of past discrimination. Instead, Justice Scalia articulated this position in his concurrence;

but, as he pointed out, such an "individualized" program would not actually be race-conscious at all. 488 U.S. at 526 (Scalia, J., concurring) (noting that "according a contracting preference to identified victims of discrimination" would in fact be "race-neutral remediation"). This Court has never held that individualized Title VII lawsuits or administrative grievance procedures are the only permissible means of remedying identified discrimination; indeed, that is not even the law under Title VII itself. *See, e.g., Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 516 (1986) (voluntary action by employers under Title VII "may include reasonable race-conscious relief that benefits individuals who were not actual victims of discrimination").

It is difficult to understand how any remedial program designed to achieve the objectives Congress had in mind could be effective without the use of some type of a presumption that certain groups have been disadvantaged by discrimination based on the racial or gender characteristics of that group. After considering substantial evidence regarding the construction industry, Congress concluded that the severity and pervasiveness of discrimination has had its most severe effect on minorities and women and, therefore, that they can presumed to be "socially disadvantaged" for purposes of determining eligibility. *See* Section I.B *supra*. At the same time, Congress authorized DOT to make this presumption rebuttable in order to preclude those who have been financially successful from obtaining benefits they do not need. *See* Section II.C.2 *infra*. In this respect, the use of the presumption resembles the burden-shifting framework under Title VII, which enables an individual to raise an inference of discrimination upon a showing of certain facts but allows this inference to be overcome upon a showing of other evidence. *See, e.g., St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 508-11 (1993). Finally, Congress authorized

DOT to allow others who had experienced other forms of discrimination to qualify under certain circumstances.

This carefully crafted scheme achieves the goal of remedying the most pernicious forms of discrimination against those who have been most severely affected, while allowing others who experience other forms of discrimination to qualify under some circumstances. Precluding the use of all types of presumptions based on race or gender would prevent Congress from addressing the reality that women and minorities have experienced pervasive and severe discrimination by making it overly difficult for members of these groups to establish these effects. Strict scrutiny would, thus, become "fatal in fact," contrary to this Court's prior statements. *See, e.g., Fullilove*, 448 U.S. at 519.

2. The Presumption Can Be Applied In A Constitutional Way

Like the aspirational goals discussed above, the presumptions of disadvantage included in the statutes potentially at issue in this case are flexible enough to be applied in a constitutional way. As implemented under the current DOT regulations, the presumption of social and economic disadvantage plays an essentially procedural role. Applicants for DBE status who are members of the specified minority groups must still certify, under penalty of perjury, that they are in fact socially and economically disadvantaged within the meaning of the statute, and that status may be challenged by any person, including the contractor, the certifying authority, and DOT itself. 49 C.F.R. §§ 26.67, 26.83, 26.87 (2000). The Small Disadvantaged Business ("SDB") program, which applies to contracting opportunities with the federal government, imposes similar requirements. 13 C.F.R. §§ 124.1002, 124.1008, 124.1016-17 (2000); 48 C.F.R. § 19.703 (2000). Moreover, and more importantly, applicants to both

programs must now demonstrate that they are economically disadvantaged by submitting documentation concerning their personal net worth, and this presumption is automatically rebutted for any individual whose net worth exceeds $750,000. 49 C.F.R. § 26.67(b)(1) (2000); 13 C.F.R. §§ 124.1002(c), 124.1008(e). Furthermore, applicants who are not entitled to the presumption may nonetheless establish, by a mere preponderance of the evidence, that they are in fact socially and economically disadvantaged. 49 C.F.R. § 26.61(d) (2000); 13 C.F.R. § 124.1008(e)(2). As implemented, therefore, the presumption simply reflects a factual judgment by Congress and the SBA that members of the enumerated groups are more likely to be socially and economically disadvantaged than not.

Petitioner's argument that those implementing regulations are inconsistent with the statutes, *see* Pet.'s Br. at 41-43, is meritless. As this Court recognized in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer," and the agency's administrative interpretations are entitled to deference. 467 U.S. at 844. This is especially true when, as is the case with DOT, the agency has substantial experience in the area in question. *Id.* at 844-45 ("'If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'") (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)). Thus, as this Court recently explained, in the case of a broad statutory authorization, an agency's "regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *See United States v. Mead Corp.*, 121 S. Ct. 2164, 2171 (2001); *see also Chevron*,

467 U.S. at 844 (noting that the agency's interpretation should be "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute"). There is no showing that these regulations are flawed in any of these ways.

The plain meaning of the term "presumption" allows for rebuttable presumptions, as even the authority which Petitioner cites makes clear. *See, e.g.*, 1 *Weinsten's Federal Evidence* § 301.02[1] (2d ed. 2000) (explaining that a "fact-finder must accept that the presumed fact...has...been established, *unless the presumption is rebutted*") (emphasis added). Moreover, the statutory framework explicitly provides that "[t]he Secretary [of Transportation] shall establish minimum uniform criteria for State governments to use in certifying whether a concern qualifies for purposes of this subsection," *see* TEA-21, Pub. L. 105-178 § 1101(b)(4), 112 Stat. at 114, which amounts to a delegation of congressional authority to "make rules carrying the force of law." *See Mead*, 121 S. Ct. at 2171 (also noting that "[d]elegation of such authority may be shown...by an agency's power to engage in adjudication or notice-and-comment rulemaking"); *cf.* 64 Fed. Reg. 5096 (Feb. 2, 1999). Furthermore, since its inception, the legislation has been accompanied by regulations which require an inquiry into whether an applicant meets the requirements of the program, and Congress has always been aware of these regulatory provisions. *Cf. Fullilove*, 448 U.S. at 487-88 (observing that "[t]here is administrative scrutiny to identify and eliminate from participation in the program MBE's who are not 'bona fide' within the regulations and guidelines; for example, spurious minority-front entities can be exposed"). Indeed, at the time that Congress enacted TEA-21, it explained that the presumption of disadvantage was rebuttable and that the regulations required an individualized inquiry into whether a particular applicant truly qualified for inclusion in the program. *See, e.g.*, 144

Cong. Rec. S1402 (Mar. 5, 1998) (statement of Sen. Baucus) ("There is the presumption that...members of certain minority groups are in fact disadvantaged. It is only a presumption, a presumption that can be overcome...."). Thus, all of the *Chevron* and *Mead* requirements are met.

CONCLUSION

Our focus in this brief has been the statutory framework underlying DOT's programs. Consequently, we respectfully urge this Court to hold the Acts of Congress potentially implicated in this litigation are facially constitutional. As noted earlier, some amici have had the opportunity to review DOT's regulations and have concluded that they meet constitutional requirements as well.

Respectfully submitted

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APPENDIX

APPENDIX

LISTING OF CONGRESSIONAL AMICI

Senator Max Baucus (Montana)
Senator Tom Daschle (South Dakota)
Senator Hillary Rodham Clinton (New York)
Senator Russell D. Feingold (Wisconsin)
Senator Edward M. Kennedy (Massachusetts)
Senator John F. Kerry (Massachusetts)
Senator Mary L. Landrieu (Louisiana)
Senator Patrick J. Leahy (Vermont)
Representative Richard A. Gephardt (Missouri)